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8 Attorneys for Defendant, City of El Segundo (erroneously sued as El Segundo  
9 Police Department)

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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF ILLIONIS**

STEVEN RENDEROS, VALERIA  
THAIS, SUAREZ ROJAS, REYNA  
MALDONADO, LISA KNOX,  
MIJENTE SUPPORT COMMITTEE,  
and NORCAL RESIST FUND

Plaintiffs,

vs.

CLEARVIEW AI, INC., ALAMEDA  
COUNTY DISTRICT ATTORNEY,  
ALAMEDA POLICE  
DEPARTMENT, EL SEGUNDO  
POLICE DEPARTMENT, ANTIOCH  
POLICE DEPARTMENT, and DOES  
1-10,

Defendants.

) Case No. 1:21-cv-00135  
) MDL No. 2967

) **DEFENDANT CITY OF EL**  
) **SEGUNDO'S NOTICE OF MOTION**  
) **AND MOTION FOR REMAND**

) **28 U.S. Code §1447(c)**

) **Hon. Sharon Johnson Coleman**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Clearview AI, Inc. is an investigative application that uses state-of-the-art  
 4 facial recognition technology to match the face in a user-uploaded image to faces  
 5 in publicly available images. It is designed to be used in ways that ultimately  
 6 reduce crime, fraud, and risk in order to make communities safer. The City of El  
 7 Segundo is restricted on using the database of Clearview AI, Inc., solely for law  
 8 enforcement and/or investigative purposes, such as suspects, criminal defendants,  
 9 witnesses or victims. The City is not permitted to use the Clearview database for  
 10 any other purpose nor has the City or its police department used the Clearview  
 11 database for purposes of facial recognition of the plaintiffs or any other persons to  
 12 date. In this civil lawsuit, plaintiffs – none of whom are residents of the City of El  
 13 Segundo – allege that Defendant Clearview AI “sold licenses to policing agencies  
 14 such as the El Segundo and Antioch Police Departments” and that Defendant El  
 15 Segundo Police Department used Clearview AI’s database to “identify people in  
 16 public spaces” and “learn those people’s professional roles, religious affiliations,  
 17 familial connections and friendships...”

18 Initially this case was filed in the Superior Court of Alameda, however, on  
 19 June 14, 2021, without the knowledge or consent of the City of El Segundo,  
 20 Clearview AI removed the case to federal court on the basis that the public entity  
 21 defendants, including the City of El Segundo were fraudulently joined. See  
 22 Exhibit 1. As discussed below, if removal is proper the City of El Segundo is  
 23 necessarily fraudulently joined and must be dismissed. If removal is improper than  
 24 the public entity defendants, including the City of El Segundo, should be severed  
 25 from the MDL litigation and remanded back to the State of California, Superior  
 26 Court of Alameda County.

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1       **II.     PLAINTIFFS' CLAIMS**

2           The operative pleading, the First Amended Complaint, asserts the following  
3 claims against the El Segundo Police Department:

- 4           (1)     Common Law Appropriation of Likeness;  
5           (2)     California Constitution Article 1 (Invasion of Privacy);  
6           (3)     Business and Professions Code § 17200;  
7           (4)     Aiding and Abetting a Tort; and  
8           (5)     Infringement on Plaintiffs' Liberty of Speech.

9       **III.     ARGUMENT**

10          Co-Defendant Clearview AI removed this action to federal court under 28  
11 U.S.C. § 1447(e) on the basis that the municipal defendants including the City of  
12 El Segundo are sham defendants that were added only to prevent diversity  
13 jurisdiction. See Exhibit 1. Because there are no federal claims (causes of action)  
14 asserted by the plaintiffs, the only basis for removal would therefore be diversity  
15 jurisdiction. When determining whether to allow removal on the basis of a  
16 fraudulent joinder courts consider several factors including: (1) whether the party  
17 sought to be joined is needed for just adjudication; (2) whether the statute of  
18 limitations would prevent the filing of a new action against the new defendant in  
19 state court; (3) whether there has been an unexplained delay in seeking to join the  
20 new defendant; (4) whether plaintiff seeks to join the new party to defeat federal  
21 jurisdiction; and (5) the strength of the claims against the new defendant. See  
22 Greer v. Lockheed Martin, 10-CV-1704 JF HRL, 2010 WL 3168408, \*3-4 (N.D.  
23 Cal. Aug. 10, 2010). **If the Court finds that federal jurisdiction exists under**  
24 **these circumstances, such a finding necessarily implies that the municipal**  
25 **defendants were fraudulently joined and must be dismissed.** See Poulos v.  
26 Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir.1992); see also Wilson v. Republic Iron  
27 & Steel Co., 257 U.S. 92, 97, 42 S.Ct. 35, 66 L.Ed. 144 (1921) ("If the removing  
28 defendant can meet this 'heavy burden,' [of proving the non-diverse defendants are

1 added only to defeat diversity] then the federal court considering removal may  
 2 disregard, for jurisdictional purposes, the citizenship of [those] nondiverse  
 3 defendants, assume jurisdiction over [the] case, **dismiss the nondiverse**  
 4 **defendants**, and thereby retain jurisdiction.”) (emphasis added). As analyzed  
 5 below, the plaintiffs’ claims against the City of El Segundo fail as a matter of law  
 6 and thus, the City of El Segundo should be dismissed from this action.

7 **A. Plaintiffs’ State Claims are Barred for Failure to Comply with the**  
 8 **Tort Claims Act.**

9 All of plaintiffs’ claims (causes of action) are barred by the California Tort  
 10 Claims Act because plaintiffs have not alleged, and cannot allege, that they filed a  
 11 timely Claim for Damages with the City of El Segundo prior to filing this lawsuit.  
 12 California Government Code section 945.5 provides that: “no suit for money or  
 13 damages may be brought against a public entity on a cause of action for which a  
 14 claim is required to be presented until a written claim therefor has been presented  
 15 to the public entity.” Cal. Govt. Code § 945.4. A claim for money damages for  
 16 injury to person or personal property must be presented within six months of the  
 17 date the claim accrues. Cal. Govt. Code § 911.2(a). Alternatively, if a claim is not  
 18 presented within six months of when it accrues, Government Code section 911.4  
 19 allows a claimant to submit an application for leave to present a late claim. Cal.  
 20 Govt. Code § 911.4(a). But, even then, such an application must be presented  
 21 “within a reasonable time not to exceed one year after the accrual . . .” Cal. Govt.  
 22 Code § 911.4(b).

23 The “failure to timely present a claim for money or damages to a public  
 24 entity bars a plaintiff from filing a lawsuit against that entity.” State v. Super.  
 25 Court (Bodde), 32 Cal. 4th 1234, 1239 (2004); see also Creighton v. City of  
 26 Livingston, 628 F. Supp. 2d 1199, 1224 (E.D. Cal. 2009) (“A plaintiff’s  
 27 supplemental state law claims against a California public agency are barred unless  
 28 the plaintiff has complied with the requirements of the Tort Claims Act before

1 commencing a civil action.”); Rezaipour v. Cty. of Los Angeles, No.  
 2 CV1205005MWFVBKX, 2014 WL 12674923, at \*8 (C.D. Cal. July 10, 2014),  
 3 *aff’d*, 655 F. App’x 552 (9th Cir. 2016) (same).

4 A review of plaintiffs’ First Amended Complaint reveals no mention of a  
 5 Claim for Damages ever being submitted to the El Segundo Police Department or  
 6 the City of El Segundo as required by California law. Moreover, the plaintiffs  
 7 cannot amend the First Amended Complaint to allege that this was done.  
 8 Therefore, all of the plaintiffs’ state law claims are barred.

9 **B. The First Amended Complaint Fails to State A Claim For Invasion**  
 10 **Of Privacy Under The California Constitution.**

11 Plaintiffs assert a cause of action for invasion of privacy under Article I of  
 12 the California Constitution against the City of El Segundo. The California  
 13 Constitution sets a “high bar” for establishing an invasion of privacy claim.  
 14 See Belluomini v. Citigroup, Inc., No. CV 13–01743 CRB, 2013 WL 3855589, at  
 15 6 (N.D.Cal. July 24, 2013). Even disclosure of very personal information has not  
 16 been deemed an “egregious breach of social norms” sufficient to establish  
 17 a constitutional right to privacy. *Id.*; see also In re iPhone Application Litig., 844  
 18 F.Supp.2d at 1063 (holding that the disclosure to third parties of unique device  
 19 identifier number, personal data, and geolocation information did not constitute an  
 20 egregious breach of privacy sufficient to prove a serious invasion of a privacy  
 21 interest); Ruiz v. Gap, Inc., 540 F.Supp.2d 1121, 1127–28 (N.D.Cal.2008), *aff’d*,  
 22 380 Fed.Appx. 689 (9th Cir.2010) (unpublished) (holding that the theft of a retail  
 23 store's laptop containing personal information, including the social security  
 24 numbers, of job applicants did not constitute an egregious breach of privacy and  
 25 therefore was not sufficient to state a claim); Folgelstrom v. Lamps Plus, Inc., 195  
 26 Cal.App.4th 986, 992, (2011) (“Here, the supposed invasion of privacy essentially  
 27 consisted of [defendant] obtaining plaintiff's address without his knowledge or  
 28 permission, and using it to mail him coupons and other advertisements. This

1 conduct is not an egregious breach of social norms, but routine commercial  
2 behavior.”). Finally, “[w]hether a legally recognized privacy interest is present in  
3 a given case is a question of law to be decided by the court.” In re Yahoo Mail  
4 Litig., 7 F. Supp. 3d 1016, 1038 (N.D. Cal. 2014).

5 Plaintiffs contend that they have a “reasonable expectation of privacy in  
6 their names, photographs biometric information, and other identifiers because the  
7 websites from which Clearview AI scrapes such information prohibits such  
8 conduct in their terms of service.” FAC ¶ 87. First, this allegation is devoid of  
9 any FACTS alleging how the City of El Segundo specifically violated their right  
10 to privacy and alleges only facts against defendant Clearview AI. Second, this  
11 allegation fails to meet the high burden required for a cause of action under  
12 Invasion of Privacy where the plaintiffs’ only allegation is that Clearview  
13 acquired information from *public* posts on social media. No California court case  
14 has ever held that a plaintiff has a constitutionally protected right to their “names,  
15 photographs, biometric information, and other identifiers” as plaintiffs assert.  
16 Third, the plaintiffs’ assertion that Clearview AI allegedly gathered this  
17 information in violation of the private websites’ terms of service does not  
18 therefore mean that this information is an invasion of privacy under the California  
19 Constitution. Moreover, plaintiffs’ do not assert that the City of El Segundo  
20 Police Department gathered this information, rather, they only assert that the El  
21 Segundo Police Department used Clearview’s services. These allegations are  
22 insufficient to assert a cause of action against the El Segundo Police Department  
23 for invasion of privacy under Article I of the California Constitution. See Smith  
24 v. Maryland, 442 U.S. 735, 743-44 (1979). (A person “has no legitimate  
25 expectation of privacy in information he voluntarily turns over to third parties.”)  
26 An individual does not have a reasonable expectation of privacy in information  
27 they volunteer to third parties “even if the information is revealed on the  
28 assumption that it will be used only for a limited purpose.” United States v.

1 Miller, 425 U.S. 435, 443 (1976). Burke v. New Mexico 2018 WL 2134030, at 5-  
 2 5 (observing that “[c]ourts routinely have found that there is no right to privacy in  
 3 internet posting that are publicly accessible.”); United States v. Meregildo, 883 F.  
 4 Supp. 2d 523,536 (S.D.N.Y. 2012) (“When a social media user disseminates his  
 5 postings and information to the public, they are not protected by the Fourth  
 6 Amendment.”); see also United States V. Borowy, 595 F.3d 1045, 1048 (9th Cir.  
 7 2010) (holding that individual had no reasonable expectation of privacy in file son  
 8 computer shared over a peer to peer file sharing network.)

9 **C. The First Amended Complaint Fails to State A Claim Against the El**  
 10 **Segundo Police Department Under California *Business and***  
 11 ***Professions Code* § 17200.**

12 Plaintiffs assert a claim (cause of action) under Business & Professions  
 13 Code § 17200 alleging “Clearview’s invasion of plaintiffs’ and plaintiffs’  
 14 members privacy is serious and highly offensive...because Clearview’s conduct is  
 15 surreptitious...because Clearview extracts biometric information from plaintiffs’  
 16 immutable characteristics...and because it places plaintiffs’ and plaintiffs’  
 17 members’ lives and livelihood in danger, both from being misidentified to law-  
 18 enforcement and immigration and from being correctly identified and targeted for  
 19 retaliation for their public political stances.” FAC ¶ 88. First, plaintiffs have not  
 20 alleged any facts regarding the El Segundo Police Department and actions that  
 21 would hold the City of El Segundo liable for such a claim and instead the  
 22 plaintiffs focus solely on defendant Clearview’s actions. Second, and most  
 23 importantly, “[Business and Professions Code] Sections 17200 and 17500 have  
 24 been held **not to apply to governmental entities** as defendants, even when those  
 25 entities are acting in a nongovernmental capacity.” People for Ethical Treatment  
 26 of Animals, Inc. v. California Milk Producers Advisory Bd. (2005) 125 CA4th  
 27 871, 22 CR3d 90; see also Trinkle v. California State Lottery, (1999) 71 Cal. App.  
 28 4th 1198, 1202, 84 Cal. Rptr. 2d 496, 498. The City of El Segundo, as a



1 governmental agency is immune from claims under Business and Professions  
2 Code § 17200.

3 **D. The First Amended Complaint Fails To State A Claim For**  
4 **Appropriation Of Likeness And Aiding And Abetting A Tort Where**  
5 **California Government Code § 815 Provides Public Entities**  
6 **Immunity For Such Torts.**

7 Plaintiffs assert that the City of El Segundo committed common law  
8 appropriation of likeness and aided and abetting Clearview in committing common  
9 law appropriation of likeness of the plaintiffs by allegedly subscribing to  
10 Clearview’s services. First, the plaintiffs First Amended Complaint lacks any facts  
11 to hold the City of El Segundo for such a claim (cause of action). Second,  
12 California Government Code section 815 declares that “[e]xcept as otherwise  
13 provided by statute: (a) A public entity is not liable for an injury, whether such  
14 injury arises out of an act or omission of the public entity or a public employee or  
15 any other person.” The statute amounts to a legislative declaration that  
16 governmental immunity from suit is the rule and liability the exception. “Thus, in  
17 the absence of some constitutional requirement, public entities may be  
18 liable *only* if a statute declares them to be liable.” Harshbarger v. City of  
19 Colton (1988) 197 Cal.App.3d 1335, 1339, 243 Cal.Rptr. 463. Certain statutes do  
20 provide expressly for public entity liability in circumstances that are somewhat  
21 parallel to the potential liability of private individuals and entities and as past cases  
22 have explained, “[T]he intent of the [Tort Claims Act] is not to expand the rights  
23 of plaintiffs in suits against governmental entities, but to confine potential  
24 governmental liability to rigidly delineated circumstances....” Brown v. Poway  
25 Unified School Dist. (1993) 4 Cal.4th 820, 829, 15 Cal.Rptr.2d 679, 843 P.2d 624;  
26 see also Zelig v. Cty. of Los Angeles, (2002) 27 Cal. 4th 1112, 1127–28, 45 P.3d  
27 1171, 1181–82. However, critically, **“there is no common law tort liability for**  
28 **public entities in California; such liability is wholly statutory.”** In re



1 Groundwater Cases (2007) 154 Cal.App.4th 659, 688, 64 Cal.Rptr.3d 827; see also  
2 Gov.Code, § 815. As such, the plaintiffs cannot assert a claim (cause of action) for  
3 common law appropriation of likeness or aiding and abetting common law  
4 appropriation of likeness where there is no common law tort liability against public  
5 entities.

6 **E. The First Amended Complaint Fails To State A Claim For Violation**  
7 **Of Free Speech Under The California Constitution Where No**  
8 **Private Right Of Action Exists.**

9 Plaintiffs assert that the City of El Segundo alleged use of Clearview’s  
10 services “chill[ed] plaintiffs and plaintiffs’ members from exercising the liberty of  
11 speech granted by the California Constitution” under Article I Section 2.  
12 However, “Article I, Section 2 of the California Constitution does not create a  
13 private right of action.” See Degrassi v. Cook, (2002) 29 Cal.4th 333, 336, 58 P.3d  
14 360. Moreover, plaintiffs’ allegations that their free speech has been chilled arises  
15 out of nothing more than speculation that they could possibly be identified or  
16 targeted by members of law enforcement. Plaintiffs have pled no facts that they  
17 actually have in any way been targeted by the City of El Segundo.

18 **F. If the Court Finds That The Municipal Defendants Were Properly**  
19 **Joined Then The Court Should Remand Them Back to California**  
20 **State Court.**

21 As explained above, the plaintiffs’ case against the City of El Segundo - and  
22 all the municipal defendants - fails as a matter of law. However, should the Court  
23 find that the municipal defendants are proper defendants to this action, this Court  
24 has no jurisdiction over the City of El Segundo where there are no federal causes  
25 of action asserted, and where both the plaintiffs and municipal defendants are  
26 residents of California. Because the MDL panel has ruled that the plaintiffs’  
27 allegations against Clearview AI “involve common questions of fact with the  
28 actions transferred to MDL No. 2967...” (See MDL Transfer Order), the City of El

1 Segundo submits that should the Court decline to dismiss the municipal defendants  
2 it would be in the interests of judicial efficiency and economy to sever the  
3 municipal defendants and remand them back to California Superior Court in  
4 Alameda County.

5 **IV. CONCLUSION**

6 Based on the foregoing, it is respectfully requested that the Court dismiss  
7 the City of El Segundo from this action with prejudice, or in the alternative,  
8 remand the plaintiffs' case against the municipal defendants back to the State of  
9 California, Superior Court for Alameda County.

10  
11 DATED: November 10, 2021 CARPENTER, ROTHANS & DUMONT LLP

12 *Caylin W. Jones*

13 By: \_\_\_\_\_

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